IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

GRAPHIC ARTS MUTUAL INSURANCE COMPANY,	)	CIVIL ACTION NO. 5:03CV00005
Plaintiff,	)	
v.	)	MEMORANDUM OPINION
MICHELLE BURGE, and MICHELLE BURGE, as next friend and legal guardian of BEN GATCHELL,	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on the parties' October 29, 2003 cross motions for summary judgment. The above-captioned civil action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* 28 U.S.C. § 636(b)(1)(B) (West 2000). On December 3, 2003, Magistrate Judge B. Waugh Crigler rendered to this court his Report and Recommendation setting forth findings and recommendations for the disposition of outstanding issues. On December 15, 2003, the plaintiff filed timely objections to portions of the magistrate judge's Report and Recommendation.

The court has performed a *de novo* review of those portions of the Report and Recommendation to which objections were made. *See* § 636(b)(1)(C); FED. R. CIV. P. 72(b). The court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument would not aid in the decisional

process.[1] Having thoroughly considered the entire case and all relevant law, and for the reasons stated herein, the court will overrule the plaintiff's objections. The court will accept the Report and Recommendation of the magistrate judge to deny the plaintiff's motion for summary judgment and to grant the defendants' motion for summary judgment.

I.

This declaratory judgment action arises from an accident that occurred in Luray, Virginia. The basic facts are largely agreed upon by both parties; therefore the court will rely upon the magistrate judge's recitation of the facts.

On April 8, 2003, Ben Gatchell, then six years old, was struck by a motor vehicle as he was crossing the street to board his assigned school bus. Ben normally boarded the bus at his assigned stop in the northbound lane of U.S. Route 340 immediately adjacent to his home. On the morning of the accident, however, Ben and his brother John missed the bus. Ben and John were aware that the bus's normal route required the driver to make a U-turn about one mile north of their assigned boarding location. Hoping to catch the bus on the return trip past their home, the boys waited outside, watching for the bus.

On this particular day, returning in the southbound lane of the highway, the bus driver, Samantha Blosser, noticed Ben and his brother running across their yard to their proper pick

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[1] In order to make an independent evaluation of credibility, a district court is not required to rehear testimony on which the magistrate judge based his findings and recommendations. Specifically, the Supreme Court has determine there is "nothing in the legislative history of the statute to support the contention that the judge is required to rehear the [arguments] in order to carry out the statutory command to make the required 'determination.' " *U.S. v. Raddatz,* 447 U.S. 667, 674 (1980).

up location. She then slowed the bus and activated her emergency equipment approximately 350 feet from the bus stop. In the last 150 feet before reaching the bus stop, Blosser took the bus out of gear and began braking.

As the bus slowed, its yellow caution lights flashing, Ben ran into the road.[2] Meanwhile, a vehicle driven by Delores Jean Smith approached in the northbound lane of the highway. Ben's stepfather, Elmer Burge, noticed Smith's car, but had been standing on the front porch and was not in a position to stop Ben. Ben's brother John, also aware of the danger posed by Smith's rapidly approaching vehicle, tried unsuccessfully to grab Ben to stop him from running into the road. Sadly, neither member of Ben's family was able to stop him, and as Ben ran out of his yard to the highway, he was struck by Smith's car. As a result of the accident, Ben sustained permanent injuries. Smith was subsequently convicted of driving on a suspended license and driving without liability insurance, and pled *nolo contendere* to a charge of reckless driving.

The local school district, Page County Public Schools, is the holder of a business automobile insurance policy issued by the plaintiff, Graphic Arts Mutual Insurance Company. This policy provides coverage for injuries caused by uninsured/underinsured motorists. The

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[2] It is unclear from the portions of the record submitted in conjunction with the parties' motions whether the bus had come to a complete stop at the exact moment Ben ran out into the road. Elmer Burge testified that the bus was stopped (Burge Dep. at 23), Delores Smith testified that the bus was still moving (Smith Dep. at 42), and Samantha Blosser does not remember whether the bus was completely stopped when Ben ran out into the road (Blosser Dep. at 13). Nonetheless, the parties do not dispute that the bus's yellow flashing lights were engaged at the time Ben was hit, and that the bus's red warning lights and stop arm had not been engaged or deployed at the time Ben entered the highway. (Def.'s Answer ¶ 10.)

policy provides this coverage to the named insured and to anyone "occupying" a covered vehicle. The defendants filed a claim under the policy's uninsured motorist provisions for over $163,000 in medical expenses Ben incurred as a result of his injuries. The plaintiff then filed this action for declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure.

II.

The plaintiff seeks a declaration that the defendants are not entitled to payment for Ben's medical expenses because Ben was not covered by the policy at the time he was injured. The essential question presented, disputed by the parties in their cross motions for summary judgment, is whether Ben was occupying or using the bus at the time he was struck by the uninsured motorist. In his Report and Recommendation, the magistrate judge answered this question in the affirmative, concluding as a matter of law that Ben was using the bus when he was struck.

The plaintiff asserts several objections which, taken together, essentially challenge the magistrate judge's analysis and application of Virginia law concerning this issue. Accordingly, the court will address these objections generally in its *de novo* review of the magistrate judge's Report and Recommendation.

III.

A.

A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact, and that the moving party is entitled to

judgment as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment . . . is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. In other words, summary judgment should be granted "in those cases in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify application of the law." *Haavistola v. Cmty. Fire Co.*, 6 F.3d 211, 214 (4th Cir. 1993). All facts and permissible inferences shall be drawn in the light most favorable to the nonmoving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000).

B.

Virginia, like many other states, statutorily mandates that all motor vehicle insurance policies contain uninsured and underinsured motorist coverage. VA. CODE ANN. § 38.2-2206 (Michie 2002 & Supp. 2003).[3] Such policies must include within their scope, notwithstanding any express terms to the contrary, coverage for "any person who *uses* the motor vehicle to which the policy applies, with the express or implied consent of the named insured." § 38.2-

[3] This action, based on federal diversity jurisdiction, is governed by the laws of the state of Virginia. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

2206(B) (emphasis added). As the plaintiff correctly notes, this statutory provision effectively renders the language of the written insurance policy irrelevant; the scope of coverage is mandated by force of law.

The Supreme Court of Virginia has addressed the scope of uninsured motorist coverage in circumstances virtually identical to those presented here. In *Newman v. Erie Insurance Exchange*, 507 S.E.2d 348 (Va. 1998),[4] a seven-year-old boy was hit by a car as he attempted to board a school bus. The boy waited for the bus alongside the eastbound lane of a two-lane highway. *Id.* at 349. The bus driver stopped the bus on the opposite side of the highway, in the westbound lane, and activated the bus's warning lights and stop arm. *Id.* As the boy crossed the eastbound lane of traffic on his way to board the bus, he was struck by an uninsured motor vehicle. *Id*. The school bus was insured under a commercial liability policy, essentially identical to the policy issued by the plaintiff here, that included uninsured/underinsured motorist coverage for anyone "occupying" a vehicle. *Id*. Although the policy definition of "occupying" did not reach "use" of the covered vehicle, the court determined that the policy must be read to include coverage for "use" as required by statute. *Id*.

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[4] *Newman* is not the first case in which the Supreme Court of Virginia has dealt with the question of when a child is "using" a school bus for purposes of uninsured motorist coverage. In an earlier case, *Stern v. Cincinnati Ins. Co.*, 477 S.E.2d 517 (Va. 1996), the Court held that a student not actually occupying a school bus was not using the bus and therefore was not within the scope of the insurance policy's uninsured motorist coverage. In light of several arguably inconsistent cases later decided, the Court chose to expressly overrule *Stern* in *Newman*. *Newman*, 507 S.E.2d at 352. Accordingly, this court is not guided by either the facts or the reasoning of *Stern*.

In determining whether the boy was using the school bus at the time he was injured, the court held that the "relevant inquiry is whether 'there was a causal relationship between the accident and the use of the insured vehicle as a vehicle.' " *Id.* at 351. The court proceeded to explain that "the use of a vehicle 'as a vehicle' requires that at the time of the injury, the vehicle is being used in a manner for which it was specifically designed or equipped." *Id.* at 352 (citing *Randall v. Liberty Mut. Ins. Co.*, 496 S.E.2d 54, 56 (Va. 1998)). Applying this test to the facts of the case before them, the court emphasized the importance of a school bus's specialized safety equipment. *Id.* at 352. The court noted that school buses are required by state regulations to be specially equipped and that the mandatory warning devices have a dual purpose: "The bus driver uses the bus's specialized safety equipment to warn approaching traffic to stop, and the child uses the safety equipment as an integral part of his mission of walking across the street to board the bus." *Id.* Thus, when a child relies upon the specialized safety equipment of a bus with the immediate intent to become a passenger in the bus, the child is using the school bus as a vehicle and must be covered by uninsured motorist insurance. *Id.*

In his Report and Recommendation, the magistrate judge also recognized the *Newman* decision as controlling precedent. Based upon his analysis of the principles articulated by the Supreme Court of Virginia in *Newman*, the magistrate judge concluded that Ben was using the bus's specialized safety equipment with the intent to board the bus and thus he was using the bus for purposes of uninsured motorist coverage.

The plaintiff concedes that the *Newman* opinion controls the outcome here; however, it objects to the magistrate judge's analysis and application of that case. In essence, the

plaintiff argues that the magistrate judge erred in applying the reasoning of the *Newman* court to a situation, as here, where a child is injured while a school bus's yellow warning lights are flashing, but before the bus's red lights and stop arm are activated. In other words, the plaintiff understands *Newman* to require that a bus be stopped with its red lights flashing and with its stop arm extended before a child may be considered to be using the specialized safety equipment of the bus.

In support of this argument, the plaintiff contends that the court's analysis in *Newman* depends on the particular regulation cited, 8 VA. ADMIN. CODE. § 20-70-80 (West 2003), which concerns loading or discharging pupils.[5] It is this regulation, the plaintiff argues, that evinces the dual purpose of the bus's specialized safety equipment—to warn approaching traffic to stop and to facilitate a child's mission of boarding the bus. According to the plaintiff, section 20-70-70, dealing with mandatory traffic warning devices,[6] does not share this dual purpose. Rather, the plaintiff asserts that this section of the administrative code is directed

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[5] Section 20-70-80 provides, in pertinent part, as follows:

> When loading or discharging pupils on the highway, stops shall be made in the right-hand lane and shall be made only at designated points where the bus can be clearly seen for a safe distance from both directions. While stopped, the driver shall keep the school bus warning devices in operation to warn approaching traffic to stop and allow pupils to cross the highway safely.

[6] Section 20-70-70 provides, in pertinent part, as follows:

> Every school bus operated at public expense for the purpose pf transporting school children shall be equipped with traffic warning devices of the type prescribed in the standards and specifications of the Board of Education. The warning lights shall indicate when the bus is about to stop, is stopped, and when it is loading or discharging children.

exclusively to aid and to notify surrounding traffic and not to facilitate a school child's mission of crossing the street. Thus, while a child may "use" a bus's red flashing lights and stop arm in his mission of crossing a street to board the bus, the plaintiff contends that a child cannot be said to "use" a bus's yellow flashing lights as they provide no guidance or protection to the child in crossing the road.

This court finds that the plaintiff's arguments must be rejected as they depend on a misunderstanding of the applicable law. First, the plaintiff reads the *Newman* opinion too narrowly, without regard for that court's general statement of the law concerning "use" of vehicles for purposes of uninsured motorist coverage. *See Edwards v. Gov't Employees Ins. Co.*, 500 S.E.2d 819 (Va. 1998); *Randall*, 496 S.E.2d at 66. The *Newman* test for "use" is merely a context-specific application of the general test that asks whether the vehicle is being used in a manner for which it was specially designed or equipped. *Newman*, 507 S.E.2d at 352. The *Newman* court's reliance upon section 20-70-80 should therefore be understood, not as a narrowing construction of the legal definition of "use" of a vehicle, but rather as a way of informing the more general inquiry.

Second, the plaintiff fails to recognize that the regulation expressly relied upon by the Virginia Supreme Court in *Newman*, section 20-70-80, incorporates the traffic warning devices mandated by section 20-70-70.[7] In fact, the *Newman* court implicitly relies on *both*

[7] In its objections to the Report and Recommendation, the plaintiff notes that the magistrate judge's reasoning was based, in part, on his assumption that the *Newman* court relied on section 20-70-70 rather than section 20-70-80. For the reasons articulated here, the court finds that this error undermines neither the reasoning nor the ultimate conclusion

regulations to reach its conclusion. Section 20-70-70 mandates that all buses be equipped with traffic warning devices (i.e., specialized safety equipment) as required by the Virginia Board of Education. The regulation clearly contemplates that bus equipment will include yellow warning lights, red warning lights, and a crossing control arm. The *Newman* court assumes that these devices are part of the specialized safety equipment of the bus and proceeds directly to the more difficult inquiry concerning the intended purpose of these devices. For this, the court relies on section 20-70-80. In the court's words, that "[a] school bus driver is required by regulation to activate a school bus' warning devices 'to warn approaching traffic to stop and allow pupils to cross the highway safely' . . . illustrates the fact that the school bus' warning devices are intended for the child's use." *Newman,* 507 S.E.2d at 352.

The court agrees with the magistrate judge that, under the circumstances presented, the only reasonable conclusion is that Ben was using the bus as a matter of law at the time he was injured. It is beyond dispute that Ben ran into the road with the immediate intent to board the bus. That he did so under the umbrella of safety provided him by virtue of the bus's specialized safety equipment establishes the necessary causal relationship between the accident and Ben's use of the bus as a vehicle. Accordingly, the plaintiff's objections shall be overruled, and the magistrate judge's Report and Recommendation shall be adopted in all pertinent respects.

IV.

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reached by the magistrate judge in his Report. This objection is therefore overruled.

For the reasons articulated herein, the court will deny the plaintiff's motion for summary judgment and will grant the defendants' motion for summary judgment. In addition, the court will adopt the magistrate judge's Report and Recommendation as modified by this opinion. An appropriate order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion and the accompanying Order to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

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Senior United States District Judge

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Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

GRAPHIC ARTS MUTUAL INSURANCE COMPANY,	)	CIVIL ACTION NO. 5:03CV00005
Plaintiff,	)	
	)	ORDER
v.	)	
MICHELLE BURGE, and MICHELLE BURGE, as next friend and legal guardian of BEN GATCHELL,	)	
Defendants.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED and DECREED

as follows:

1. The Plaintiff's Objections to the Report and Recommendation, filed December 15, 2003, shall be, and hereby are OVERRULED;

2. The Magistrate Judge's Report and Recommendation, filed December 3, 2003, shall be, and hereby is, ACCEPTED and ADOPTED as modified by the accompanying Memorandum Opinion;

7. The Plaintiff's Motion for Summary Judgment, filed October 29, 2003, shall be, and hereby is, DENIED; and

8. The Defendants' Motion for Summary Judgement, filed October 29, 2003, shall be, and hereby is GRANTED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

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Senior United States District Judge

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Date